

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No: EB-10-MA-0198
Durrant Clarke)	
)	NAL/Acct. No: 201132600007
Miami, Florida)	
)	FRN: 0020872792
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 19, 2011

Released: May 19, 2011

By the Resident Agent, Miami Office, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), we find that Durrant Clarke (“Mr. Clarke”), apparently willfully and repeatedly violated section 301 of the Communications Act of 1934, as amended (“Act”),¹ by operating an unlicensed radio transmitter on the frequency 95.9 MHz from his business in Miami, Florida. We conclude that Mr. Clarke is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

2. On November 6, 2010, and again on November 20, 2010, agents from the Enforcement Bureau’s Miami Office (“Miami Office”) used direction-finding techniques to locate the source of radio frequency transmissions on the frequency 95.9 MHz to a business in Miami, Florida. According to property records, Mr. Clarke is the owner of the property at this address. According to Florida corporation records, Mr. Clarke is the owner and director of the business at this location. The agents determined on November 6, 2010 that the signals exceeded the limits for operation under Part 15 of the Commission’s rules (“Rules”),² and therefore required a license. Commission records showed no authorization issued to Mr. Clarke or to anyone for operation of an FM broadcast station at or near this address on this frequency.

3. During the November 20, 2010 inspection of the unlicensed radio station at Mr. Clarke’s business, Mr. Clarke stated that he was the owner of the property and the business and, in response to a request to inspect the transmitting equipment, he showed the agents an unlocked room adjoining his office, which contained an operational FM broadcast transmitter. Mr. Clarke stated that: (1) he allowed an acquaintance to place the transmitting equipment there about four weeks earlier; (2) he was aware of the equipment when it was installed and was aware it was a radio transmitter of some kind; (3) the equipment

¹ 47 U.S.C. § 301.

² Part 15 of the Rules sets out the conditions and technical requirements under which certain radio transmission devices may be used without a license. In relevant part, section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. 47 C.F.R. § 15.239.

used his electrical power and used his router to connect to the internet; and (4) he turned the transmitter on and off at different times in the past per instructions from his acquaintance. During the inspection, Mr. Clarke turned the transmitter off and the agents confirmed that the station they had monitored on 95.9 MHz simultaneously ceased operation.

III. DISCUSSION

4. Section 503(b) of the Act,³ provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. Section 312(f)(1) of the Act defines willful as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁴ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both section 312 and 503(b) of the Act⁵ and the Commission has so interpreted the term in the section 503(b) context.⁶ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁷ The term “repeated” means the commission or omission of such act more than once or for more than one day.⁸

5. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States except under and in accordance with the Act and with a license granted under the provisions of the Act.⁹ For the purposes of section 301, the word “operate” has been interpreted to mean both the technical operation of the station, as well as “the general conduct or management of a station as a whole, as distinct from the specific technical work involved in the actual transmission of signals.”¹⁰ In other words, the use of the word “operate” in

³ 47 U.S.C. § 503(b).

⁴ 47 U.S.C. § 312(f)(1).

⁵ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., section 503)... As defined ... ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission’s application of those terms ...”).

⁶ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California Broadcasting Co.*”).

⁷ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (“*Callais Cablevision, Inc.*”) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

⁸ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under section 503(b) of the Act, provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”

⁹ 47 U.S.C. § 301.

¹⁰ See *Campbell v. United States*, 167 F.2d 451, 453 (5th Cir. 1948) (comparing the use of the words “operate” and “operation” in sections 301, 307, and 318 of the Act and concluding that the word “operate” as used in section 301 of the Act means both the technical operation of the station as well as the general conduct or management of the station).

section 301 of the Act captures not just the “actual, mechanical manipulation of radio apparatus”¹¹ but also operation of a radio station generally.¹² To determine whether an individual is involved in the general conduct or management of the station, we can consider whether such individual exercises control over the station, which the Commission has defined to include “. . . any means of actual working control over the operation of the [station] in whatever manner exercised.”¹³

6. On November 6 and again on November 20, 2010, agents from the Miami Office determined that an unlicensed radio station on the frequency 95.9 MHz was operating from Mr. Clarke’s business address in Miami, Florida. A review of the Commission’s records revealed that Mr. Clarke did not have a license to operate a radio station at this location. As discussed more fully below, we find that Mr. Clarke is apparently liable for operating the unlicensed radio station on 95.9 MHz because he demonstrated control over the management of the station as a whole.

7. Together, the facts show Mr. Clarke had control of the station and thus was involved in the general conduct or management of the station. During the inspection, and by his own admission, Mr. Clarke had control over the physical space in which the transmitter was located, provided the station’s electricity and internet access, was aware that the transmitter was there, and turned the transmitter on and off several times.¹⁴ Mr. Clarke also demonstrated control over the station by turning the transmitter off during the inspection. The fact that someone else also may have been involved in the station’s operation does not make Mr. Clarke any less of a participant in the station’s operation. We have previously held that, because section 301 of the Act provides that “no person shall use or operate”¹⁵ radio transmission equipment, liability for unlicensed operation may be assigned to any individual taking part in the operation of the unlicensed station, regardless of who else may be responsible for the operation.¹⁶ Because Mr. Clarke consciously operated the station on more than one day, the apparent violation was willful and repeated. Based on the evidence before us, we find that Mr. Clarke apparently willfully and repeatedly violated section 301 of the Act by operating radio transmission equipment without the required Commission authorization.

8. Pursuant to the Commission’s *Forfeiture Policy Statement* and section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization is \$10,000.¹⁷ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁸ Applying the *Forfeiture Policy Statement*, section 1.80 of the Rules,

¹² *Id.* See also 47 U.S.C. § 307(c)(1).

¹³ See *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9747 (1995), *recon. denied*, *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

¹⁴ See, e.g., *Vicot Chery*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 14596 (Enf. Bur. 2010).

¹⁵ 47 U.S.C. § 301.

¹⁶ See, e.g., *Jean L. Senatus*, Forfeiture Order, 20 FCC Rcd 14418 at para. 11 (Enf. Bur. 2005); *Robert Brown*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13740 (Enf. Bur. 2010); *Loyd Morris*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 13736 (Enf. Bur. 2010).

¹⁷ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (“*Forfeiture Policy Statement*”), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁸ 47 U.S.C. § 503(b)(2)(E).

and the statutory factors to the instant case, we conclude that Mr. Clarke is apparently liable for a forfeiture in the amount of \$10,000.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act and sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Rules, Durrant Clarke is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violation of section 301 of the Act.¹⁹

10. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Durrant Clarke **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture must be made by credit card, check, or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁰ For questions about payment procedures, contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov. Durrant Clarke shall send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

12. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to Federal Communications Commission, Enforcement Bureau, South Central Region, Miami Office, P.O. Box 520617, Miami, FL 33152-0617, and must include the NAL/Acct. No. referenced in the caption. The written statement shall also be emailed to SCR-Response@fcc.gov.

13. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

¹⁹ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80.

²⁰ See 47 C.F.R. § 1.1914.

14. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and regular mail, to Durrant Clarke at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Steven DeSena
Resident Agent
Miami Office
South Central Region
Enforcement Bureau